82-1160

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANATOLY ARUTUNOFF, KATHIE M. LEE, BEVERLY CHANSOLME, BOB MILLER, TOM LAURENT, PAUL WOODARD, JIM SESSIONS, THOMAS G. WINTER, DAN PHILLIPS, LYNN CRUSSEL, AND GORDON MOBLEY,
Petitioners,

v.

THE OKLAHOMA STATE ELECTION BOARD, GRACE HUDLIN, CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; DREW NEVILLE, VICE CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; AND LEE SLATER, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously failed to take into consideration historical election experiences and data, contrary to decisions of this Court and the Eighth Circuit Court of Appeals, in upholding on a *per se* basis Oklahoma's new election laws that had substantially increased ballot access and retention requirements for political parties in Oklahoma.

2. Whether the Court of Appeals applied an erroneous standard of review, in conflict with decisions of this Court and of the Eighth Circuit Court of Appeals, in upholding Oklahoma's new election laws that had substantially increased ballot access and retention requirements for political parties in Oklahoma.

3. Whether Oklahoma's new election laws are violative of the First and Fourteenth Amendments, as applied to the facts of the case at bar, in that they are not framed in the least restrictive manner necessary to achieve legitimate State aims in regulating ballot access.

4. Whether the Court of Appeals erred in concluding that Oklahoma's new election laws are not violative of the First and Fourteenth Amendments, as applied to the facts of the case at bar, in that they discriminate in favor of Independent candidates for elective office as opposed to third party candidates.

5. Whether the Court of Appeals erroneously failed to address and decide the issue of whether the Oklahoma election laws in question violate the rights of citizens under the First and Fourteenth Amendments, as applied to the facts of the case at bar, in that they prevent citizens from registering to vote as members of non-recognized political parties in Oklahoma.

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OPINIONS BELOW

The opinion of the United States Court of Appeals, *Arutunoff v. Oklahoma State Election Board,* is reported at 687 F.2d 1375 (10th Cir. 1982), and is set forth in Appendix B. The decision of the United States District Court for the Western District of Oklahoma is unreported and is set forth in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix B, *infra*) was entered on September 3, 1982. A timely petition for rehearing suggesting appropriateness of rehearing in banc was denied on October 14, 1982 (Appendix A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statutes challenged by petitioners are Oklahoma Statutes, Title 26, §§ 1-102 (Supp. 1977); 1-109 (Supp. 1974); 1-110 (Supp. 1974); 4-112 (Supp. 1976); 5-104 (Supp. 1974); 5-112 (Supp. 1978); and 10-101.1 (Supp. 1977), which are set forth in relevant part in Appendix D, hereto. Petitioners' challenge is based on the First and Fourteenth Amendments to the United States Constitution; 42 United States Code § 1983; the Oklahoma Constitution, Art. III, §§ 3 and 4 (amended 1978); and Oklahoma Statutes, Title 26, §§ 111, Laws 1913, Ch. 157, p. 318, § 9 (Repealed January 1, 1975); 229, Laws 1923-24, Ch. 151, p. 214 (Repealed January 1, 1975); 1-108 (Supp. 1974); and 10-101 (Supp. 1977), which are also set forth in relevant part in Appendix D.

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Tenth Circuit, upholding certain election laws of the State of Oklahoma that substantially increased the ballot access and retention requirements for Oklahoma Political Parties. *Arutunoff v. Oklahoma State Election Board,* 687 F.2d 1375 (10th Cir. 1982).

The Libertarian party had gained status as an officially recognized political party in Oklahoma on June 13, 1980, after filing with the Oklahoma State Election Board the requisite number of valid signatures under Title 26, Oklahoma Statutes, § 1-108 (viz., five percent of the total votes cast for Governor of

Oklahoma in the general election of 1978). (Record, vol. III, transcript p. 10—"approximately 39,000 valid signatures"). Also see *Crussel v. Oklahoma State Election Board,* 497 F. Supp. 646 (W.D. Okla. 1980). The members of the Libertarian Party were then allowed to register as Libertarians and nominate candidates for elective office to be filled at the General Election on November 4, 1980. The Libertarian Party entered candidates in a number of elections in Oklahoma in 1980, with their nominee for President of the United States receiving 1.2% of the total Oklahoma vote for President of the United States (Record, vol. I, p. 57), and, thus, the Oklahoma Libertarian Party was faced with being decertified by the Oklahoma State Election Board pursuant to Title 26, Oklahoma Statutes, §§ 1-109 and 1-110, which provide respectively, that any recognized political party whose nominee for Governor or nominees for electors for President fail to receive at least ten percent of the total votes cast for said office in any General Election shall cease to be recognized as a political party in Oklahoma with the registered members of said party having their affiliation changed from the said party affiliation to that of Independent registration. The case at bar resulted from the threatened, and later realized, action described above. (Record, vol. I, pp. 57-58).

On November 7, 1980, the eleven petitioners herein[1] filed a class action suit on behalf of themselves and on behalf of all individuals in the State of Oklahoma who, but for the complained of Election Laws,[2] plan in the future to register to vote as Libertarians. Said lawsuit, as amended on November 14, 1980, sought a judgment declaring certain Oklahoma Election Laws (Okla. Stat., tit. 26, §§ 1-102, 1-109, 1-110, 4-112, 5-104, 5-112, and 10-101.1), as applied to the petitioners herein, unconstitu-

[1] The eleven petitioners herein were all citizens of the State of Oklahoma and registered to vote as Libertarians at the time of the filing of this action in the trial Court.

[2] Okla. Stat., tit. 26, §§ 1-102, 1-109, 1-110, 4-112, 5-104, 5-112, and 10-101.1.

tional in that they violate the First and Fourteenth Amendments of the United States Constitution and 42 United States Code, § 1983. Jurisdiction of the Court was invoked pursuant to 28 U.S.C. §§ 1343(3), (4), 2201, 2202; and 42 U.S.C. § 1983. The eleven Libertarians also sought an injunction, both permanent and temporary, against the Oklahoma State Election Board and its members (respondents herein), who are responsible for administering the election laws of Oklahoma, prohibiting them from following and enforcing the provisions of Okla. Stat., tit. 26, §§ 1-109, 1-110, and 4-112.

The petitioners herein premised their lawsuit on the fact that the Oklahoma election laws in question were not set up as to the issue of ballot access for third political parties in the "least drastic means" to serve a "compelling state interest," tend to discriminate in favor of independent candidates as opposed to third party candidates, and prevent people from registering to vote as members of non-recognized political parties—all in violation of the rights of the petitioners under the First and Fourteenth Amendments to the United States Constitution to political association, to cast one's vote effectively, and equal protection of the laws.

The trial Court, upon consideration of the evidence and the stipulations of the parties, denied the requested declaratory and injunctive relief, held petitioner's allegations to be without merit, and ordered the cause dismissed. In so finding, the trial Court failed entirely to address the filing fee alternative for ballot access which is allowed independent candidates[3] and the aforesaid registration issue.[4] As to the issue of whether the 10%

[3] Okla. Stat., tit. 26, § 5-112 (Supp. 1978). Under this statute, an independent need only pay a filing fee of betweeen $50 to $1,500 to run for office or submit a petition of 5% of the registered voters eligible to vote for the elective office in question—e.g., State Senator, $200 or 5% of eligible voters in the one out of 48 State Senate districts in Oklahoma.

[4] Okla. Stat., tit. 26, §§ 1-110 (Supp. 1974) and 4-112 (Supp. 1976), Pet. App. D.

requirement for retention of recognized party status was framed in the least restrictive means to achieve the recognized state interest in regulating access to the ballot, the Court—while finding ". . . it easily credible that the State of Oklahoma could require political parties to achieve a percentage of votes less than is now required and still achieve its goal of restricting ballot access to those parties which have a minimum of popular support"—held that there was no ". . . cognizable basis for this Court requiring that the state lower the percentage requirement from its current level." Pet. App. C. Such a conclusion by the trial Court totally ignored the historical election experiences and data on Oklahoma ballot access[5] and the existence prior to January 1, 1975, of §§ 111 and 229 of title 26 of the Oklahoma Statutes.[6]

On appeal to the Tenth Circuit Court of Appeals, a 2-1 majority decision affirmed the decision of the trial Court and ruled that the statutes in question were not "unduly oppressive" nor "unconstitutional, *per se*." The two judge Appeals Court majority further stated that it was not impressed with the argument that Okla. Stat., tit. 26, §§ 229 and 111 (repealed 1975) represented less drastic means to achieve legitimate state ends. This fact standing alone, the Court held, was not sufficient to require a reversal. The Court failed, however, to discuss at all historical election experiences and data as such related to the case at bar.

In her dissent to the majority opinion, Judge Seymour noted that the " . . . challenged statutes, which took effect in 1975, substantially restrict the ability of a minority party to gain recognized status." Pet. App. D, *Arutunoff v. Oklahoma State Election Board, supra* at 1380. Looking at the historical election experiences and data in the record as well as the statutes in ques-

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[5] See on this point the charts on ballot access and retention which are set forth under heading I of the Reasons for Granting the Petition herein, *infra*.

[6] Okla. Stat., tit. 26, §§ 111and 229 (repealed 1975), Pet. App. D.

tion, the dissent concluded that the new, challenged election laws burdened the fundamental rights of political association and the right to cast votes effectively. "[W]hen such 'vital individual rights are at stake,' the state must establish a 'compelling interest' and must adopt the least drastic means to achieve [its] ends." [Citations omitted]. "This is the traditional articulation of strict judicial scrutiny that is applied when state laws burdening fundamental rights are analyzed." *Arutunoff v. Oklahoma State Election Board, supra* at 1381. The dissent found that the majority opinion had failed to use the aforesaid strict scrutiny standard by misinterpreting the recent Supreme Court decision in *Clements v. Fashing,* ____U.S.____, 73 L.Ed.2d 508 (1982).[7] In concluding, the dissent also found it

> significant that the State did not need to change its voting laws to prevent frivolous or fraudulent candidates from gaining access to the ballot, to avoid voter confusion, or to prevent the burden of runoff elections. The record establishes that ballot overcrowding did not plague Oklahoma elections with these problems before the ballot access requirements were made more stringent. The American Independent Party in 1968 was the only party to gain recognition in the thirty years before the enactment of the new provisions. Numerous decisions have considered such state experience relevant in ballot access cases.[8]

After the 2-1 decision of the three judge Court of Appeals panel, the petitioners herein filed a petition for rehearing in

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[7] The *Clements* case upheld differing resign-to-run provisions for different offices against an equal protection attack. While a majority of the Supreme Court did not agree on the particular standard of review applicable to the fact situation in *Clements* (four Judges dissented and Judge Stevens concurred in only part of the plurality opinion), all members of the Court agreed that "traditional equal protection analysis" is not sufficiently protective of fundamental rights in cases " . . . involv[ing] classification schemes or independent candidates." *Clements v. Fashing, supra,* 73 L.Ed.2d 508, at 517.

[8] *Arutunoff v. Oklahoma State Election Board, supra,* at 1382-1383.

banc. The three judge panel maintained its previous 2-1 vote, and the dissenting judge requested a vote on the suggestion that the appeal be reheard in banc. The eight judges of the Tenth Circuit Court of Appeals then voted 4-4 on said suggestion, with the tie vote resulting in the suggestion for rehearing in banc being denied. Pet. App. A.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals below is in conflict with decisions of this Court as well as the Eighth Circuit Court of Appeals. Not only has the Tenth Circuit failed to take into consideration historical election experiences and data in upholding on a *per se* basis Oklahoma's new election laws, but it has also applied an erroneous standard of review in declining to use the "least drastic means" to achieve a "compelling state interest." Further, the Court of Appeals failed to address the issues raised in the instant case of whether the candidate filing fee alternative of Okla. Stat., tit. 26, § 5-112 (Supp. 1978), discriminates against party candidates and in favor of independent candidates, and whether the new Oklahoma election laws in question violate the rights of Oklahoma citizens to register to vote as members of non-recognized political parties in Oklahoma. Finally, the case at bar presents this Court with an issue of first impression in that all previous cases before this Court involving ballot access for minor political parties never involved a situation, wherein a State had made election laws more restrictive, but rather situations where long standing election laws of static standards were being challenged. Therefore, petitioners respectfully submit that a writ of certiorari should be granted, and that the opinion below should be reversed.

I. The Decision Below Erroneously Failed To Take Into Consideration Historical Election Experiences and Data

The 2-1 opinion of the Court of Appeals below fails totally to discuss or consider the historical election experiences and data in reaching its decision in judging the ballot access and

retention laws in question as required by this Court in *American Party of Texas v. White,* 415 U.S. 767 (1974); *Storer v. Brown,* 415 U.S. 724 (1974); *Jenness v. Fortson,* 403 U.S. 431 (1971); *Williams v. Rhodes,* 393 U.S. 23 (1968); and by a somewhat similarly issued case of the United States Court of Appeals for the Eighth Circuit, *McLain v. Meier,* 637 F.2d 1159 (8th Cir. 1980). While the majority opinion below states that the states " . . . have important interests in protecting the integrity of their political process from frivolous or fradulent candidacies, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections," the majority fails to explain why the new, more restrictive laws are necessary when the old, less restrictive ballot access and retention laws adequately met the aforesaid compelling state interests.[9]

Further, the majority decision below demonstrates its lack of thoroughness in reviewing the issues in question by stating in its opinion that the position of the appellants (petitioners herein) is necessarily " . . . that any election law requirement is unconstitutional if it demands a recognized political party receive *more* than 1.2 percent of the total votes cast as a condition for continuing as a recognized political party." *Arutunoff v. Oklahoma State Election Board, supra,* at 1380, Pet. App. B. The majority also says on page 1379 of its opinion that the new

[9] The historial election statistics herein show that the former Oklahoma election laws worked quite well in meeting compelling state interests. (Record, vol. II, plaintiffs' exhibits 5-17). The Oklahoma ballot was not inundated with minor party candidates, nor besought by fraud and disorder. From 1908 to 1944, such third parties as the Socialist, Prohibition, and Progressive appeared on the Oklahoma ballot. After 1944 no political party other than the Republican or Democrat appeared on the Oklahoma ballot until 1968 when the American Independent Party of George Wallace achieved ballot status. After failing to meet the requirements of the 10% of the winning candidate's votes for President in 1972 (7.37% of the vote was required that year and the American Independent candidate received only 2.3% for President in Oklahoma, Record, vol. II, plaintiffs' exhibit 17), the American Independent Party was decertified as a political party in Oklahoma pursuant to Okla. Stat., tit. 26, § 111 (repealed 1975).

law requiring 10% of the total vote cast in order to maintain ballot status is not *"unconstitutional, per se."* Such statements demonstrate: first, that the majority does not understand that the old law, if applied to the petitioners, would have allowed them a second chance in the next Oklahoma general election to get 10% of the winning candidate's vote before having to repetition to get back on the ballot, Okla. Stat., tit. 26, § 111 (repealed 1975), Pet. App. D, and, second, that the majority in looking at the election laws in question, *per se,* is admitting that it is failing to take into consideration past experiences and historical election data in seeing if the new laws in question are the least drastic means to achieve compelling state interests.

The most pertinent election data which the majority opinion failed to discuss can perhaps be best presented in the following charts on ballot access and ballot retention requirements for Oklahoma:

BALLOT ACCESS CHART

Number of signatures of registered voters required under Okla. Stat., tit. 26, § 1-108 (Supp. 1974), in order for a new political party to successfully petition for ballot status and political party recognition.[10]

Date of General Election[11]	Total vote cast for President or for Governor	New political party petition signature requirement[12]	Ballot requirement for Independent candidates
1982	Not applicable	57,485	5% or $1,500[13]
1980	1,149,708	38,870	32,768[14]
1978	777,414	54,613	5% or $1,500[13]
1976	1,092,251	40,242	No provision[15]
1974	804,848	5,000[16]	Not applicable

[10] Ballot Access Chart statistics were taken from Oklahoma election figures shown in the *Directory of Oklahoma for 1981,* Oklahoma State Election Board, Okla. Stat., tit. 26, § 3-129 (Supp. 1978).

[11] Presidential elections were held in 1980 and 1976. Gubernatorial elections were held in 1982, 1978, and 1974.

BALLOT RETENTION CHART

Number of votes required to be cast for the nominee of a political party in Oklahoma for either President or Governor in order for said political party to retain its ballot status as a recognized political party.[17]

Date of General Election[18]	Total Vote cast for President or for Governor	Total vote cast for the winning party[19]	Votes required by new law[20]	Votes required by old law[21]
1980	1,149,708	695,570	114,970	69,557
1978	777,414	402,240	77,714	40,224
1976	1,092,251	545,708	109,225	54,570
1974	804,848	514,389	80,484	51,438
1972	1,029,900	759,025	102,990	75,902
1970	698,790	338,338	69,879	33,833

[12] Okla. Stat., tit. 26 § 1-108 (Supp. 1974), applies to all elections after 1974. It also sets exact standards as to form, time period, and manner in which the ballot petitions for a new political party are to be filed. Such additional requirements were not part of Okla. Stat., tit. 26, § 229 (repealed 1975). Pet. App. D.

[13] Means that an Independent may run for Governor of Oklahoma if he submits a petition bearing the names of 5% of the registered voters in Oklahoma or pays a $1,500 candidate's fee. Okla. Stat., tit. 26, § 5-112 (Supp. 1978). Pet. App. D. Independent candidates for other offices have the option of submitting petitions containing the signatures of 5% of the voters eligible to vote for them in the general election or paying a candidate's fee (depending on the office sought) of from $50 to $1,000.

[14] Okla. Stat., tit. 26 § 10-101.1 (Supp. 1977), Pet. App. D. Said law requires a 3% petition signature total of the total vote in the last Presidential election in Oklahoma—in 1984 the requirement will be 34,491 petition signatures.

[15] No provision for Independent candidates for President: thus, Eugene McCarthy had to resort to a lawsuit, *McCarthy v. Slater*, 553 P.2d 489 (Okla. 1976).

As the foregoing two charts show, before the election laws of Oklahoma were changed on January 1, 1975, Oklahoma's election laws were marked by relatively liberal and minimum restrictions on ballot access. The Oklahoma law required only that a new political party submit a petition of 5,000 names of Oklahoma voters in order for that political party to run candidates for elective office. Okla. Stat., tit. 26, § 229 (repealed 1975), Pet. App. D. Once on the ballot a political party, in order to stay on the ballot, needed to have its candidate for President or Governor receive 10% of the vote cast for the party receiving the highest number of votes in one of the two subsequent general elections. Okla. Stat., tit. 26, § 111 (repealed 1975), Pet. App. D. Even if after failing in two general elections in getting the required 10% of the winning candidate's vote, the

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[16] Okla. Stat., tit. 26, § 229 (repealed 1975), Pet. App. D. The old law applied to all elections prior to January 1, 1975. Said law had few other requirements.

[17] Ballot Retention Chart statistics were taken from Oklahoma election figures shown in the *Directory of Oklahoma for 1981*, Oklahoma State Election Board, Okla. Stat., tit. 26, § 3-129 (Supp. 1978).

[18] Presidential elections were held in 1980, 1976, and 1972. Gubernatorial elections were in 1978, 1974, and 1970.

[19] Total vote cast in Oklahoma for the winning candidate for either President or Governor in the State of Oklahoma.

[20] Votes required to be cast in Oklahoma general election for the nominee of a political party for either President or Governor in order for said political party to remain on the ballot under the new, more restrictive law. Okla. Stat., tit. 26, § 1-109 (Supp. 1974). Pet. App. D.

[21] Votes required to have been cast in the Oklahoma general election for the nominee of a recognized political party for either President or Governor in order for the said political party to remain on the ballot under the former law which was in effect prior to January 1, 1975. Okla. Stat., tit. 26, § 111 (repealed 1975). It is important to remember that this requirement could be met by obtaining the required number of votes in only one of the past two general elections.

political party needed only to meet the 5,000 signature petition requirement of § 229.

Despite these moderate standards—at least compared to the present standards—the Oklahoma ballot was never overrun by minor parties nor in a state of fraud and confusion. (In fact, as noted in footnote 9 of this petition, *supra,* the Oklahoma ballot rarely had a third party on it, and only one third party on its ballot in the thirty years after World War II). Needless to say, the above analysis was missing from the Court of Appeals majority decision because it chose to consider the challenged election laws on a *per se* basis and ignore the historical election experiences and data.

II. The Decision Below Applied an Erroneous Standard of Review

The aforesaid majority opinion of the Court of Appeals is in conflict with this Court and the Eighth Circuit Court of Appeals as to the appropriate standard of judicial scrutiny to be applied to election law cases where fundamental rights are burdened as set forth by this Court in *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979); *Storer v. Brown, supra; American Party of Texas v. White, supra; Kusper v. Pontikes,* 414 U.S. 51 (1973); *Jenness v. Fortson, supra; Williams v. Rhodes, supra;* and the Eighth Circuit's ruling in *McLain v. Meier, supra.*

While the Court of Appeals seems to believe that the recent Supreme Court decision in *Clements v. Fashing, supra,* supports a standard other than strict scrutiny in ballot access cases, *Clements* actually holds that strict scrutiny is to be applied in "ballot access cases involving classification schemes that impose burdens on new or small political parties or independent candidates." *Clements v. Fashing, supra,* at 517.

Since *Clements* concerned statutory election burdens on candidates which in no way " . . . contain[ed] any classification that impose[d] special burdens on minority political parties or independent candidates [and which] . . . in no way depend[ed]

upon political affiliation or political viewpoint," *Clements v. Fashing, supra,* it is a poor case to justify a change in the Supreme Court's teaching that the "compelling state interest" and "least drastic means" are the appropriate standards of review under strict scrutiny to be applied in situations like the instant case where fundamental rights protected by the Constitution, i.e., the right to political association and the right to cast votes effectively, are burdened. *Illinois State Board of Elections v. Socialist Workers Party, supra; Williams v. Rhodes, supra.*

Considering that the case at bar does involve access and retention restrictions that do burden minority political parties, unlike *Clements,* the appropriate standard of review which is required by this Court is strict scrutiny, so that state laws cannot stand unless they "further compelling state interests . . . that cannot be served equally well in significantly less burdensome ways." *American Party of Texas v. White, supra,* at 780-781. As the dissent in *Arutunoff* noted:

> The district court in this case specifically found that means less restrictive than those embodied in the challenged statutes are available to Oklahoma to achieve its goal. However, the court concluded that established law does not require use of the least restrictive means. This legally erroneous statement is affirmed by the majority opinion, which would substitute "not unduly burdensome" or "not unnecessarily oppressive" for "least restrictive." *Arutunoff v. Oklahoma State Election Board, supra,* at 1382.

III. Oklahoma's New Election Laws Do Not Meet the Strict Scrutiny Standard of Review Because They Are Not Framed in the Least Restrictive Manner Necessary to Achieve Legitimate State Aims in Regulating Ballot Access

In the case at bar, the majority opinion held that "Admittedly, the repealed statutes are somewhat less restrictive than the present statute, although, in our view, not markedly so."

Arutunoff v. Oklahoma State Election Board, supra, at 1380. This is a singularly incredulous statement which defies both the facts in the instant case and logical reasoning. The ballot retention statute in question, Okla. Stat., tit. 26, § 1-109 (Supp. 1974), requires a political party to have its candidate for Governor or President receive 10% of the total vote cast. The repealed statute, Okla. Stat., tit. 26, § 111 (repealed 1975), required the less drastic requirement of 10% of the winning candidate's vote for Governor or President in only one of the last two general elections. In election statistics, this translates into the difference between 69,557 votes in the 1980 general election and the opportunity if this vote total is not achieved to try again in the 1982 general election (under the old law) as opposed to the new law's requirement of 114,970 votes for the 1980 general election with no additional opportunities to stay on the ballot other than a new ballot drive.

In considering a new ballot drive, we also have a considerably more restrictive law governing ballot access. The old law, Okla. Stat., tit. 26, § 229 (repealed 1975), required only 5,000 signatures on a petition to recognize a new party, while the new law, Okla. Stat., tit. 26, § 1-108 (Supp. 1974), requires 5% of the total vote cast for Governor or President in the last general election. In 1982, the new law requires 57,485 petition signatures—a figure eleven times higher than the old law, and almost 50% higher than the 38,870 signatures required under the new law to get on the ballot for 1980. Oklahoma State Election Board, *Directory of Oklahoma 1981* at 652.[22] As Circuit Judge Seymour said in her dissent to the majority opinion:

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[22] In order to see just how far out of step Oklahoma is here, consider the petitioning requirement of Ohio—site of the dispute in *Williams v. Rhodes.* In 1968, the Ohio requirement was 15% of the last Gubernatorial election vote, by 1980, it had dropped to just 5,000—which amounted to about 12/100's of 1% of the vote in the last Presidential election. See *Anderson v. Celebrezze,* 499 F. Supp. 121, 124 (S.D. Ohio 1980), *rev'd,* 664 F.2d 554 (6th Cir. 1981). It should be further noted here that Oklahoma is one of only six States which does not allow write-in votes. Okla. Stat., tit. 26, §§ 5-101 and 7-127(2) (Supp. 1978).

> Because the election turnout in a presidential year is significantly greater than in a gubernatorial year, the retention requirement is much more stringent after a presidential election. This problem was avoided under the old law which permitted retention if a party received 10% of the votes cast in either of the two preceding general elections. [*Arutunoff v. Oklahoma State Election Board, supra,* at 1381, n. 2.].

Also, it should be noted there was no problem under the old law as to ballot access between Gubernatorial and Presidential elections in as much as the old requirement was the same for all elections, rather than making ballot access easier in Presidential years.

As can be seen from the above, the majority opinion fails to apply the least drastic means which serve a compelling state interest. Such a test is appropriate here since the First Amendment rights involved in the case at bar are not so insignificant as to be *de minimus* as in *Clements v. Fashing, supra,* at 521.

IV. Oklahoma's New Election Laws Discriminate Unconstitutionally in Favor of Independent Candidates and Against Third Party Candidates

While Independent candidates for office in Oklahoma need only pay a small filing fee ($50 to $1,500) in order to run in the general election—thus, sidestepping the petitioning requirement altogether. Okla. Stat., tit. 26, § 5-112 (Supp. 1978), third party candidates must meet the petitioning requirments of Okla. Stat., tit. 26, § 1-108 (Supp. 1974), and do not have a filing fee option to get on the ballot. Since no third party has run a candidate for Governor since 1970, Oklahoma State Election Board, *Directory of Oklahoma for 1981,* at 652, even though the 1978 Governor's race had, in addition to the two major party candidates, four independent candidates for Governor, Congressional Quarterly, Inc., "Politics in America," p. 306 (1979), it might be wondered if Oklahoma " . . . is willing to encourage minority political voices, but only if they are partially

stripped of a legitimizing party label." *McLain v. Meier, supra,* at 1165, n.12. "A candidate who wishes to be a party candidate should not be compelled to adopt Independent status in order to participate in the electoral process." *McLain v. Meier, supra,* at 1165. Indeed, fairness and the equal protection of the law might very well dictate that third party candidates for offices other than President also be given the candidate's fee option of Okla. Stat., tit. 26, § 5-112 (Supp. 1978).

V. The Court of Appeals Below Erroneously Failed to Address the Issue of Whether the Oklahoma Election Laws Unconstitutionally Prevent Citizens from Registering to Vote as Members of Non-recognized Political Parties in Oklahoma

Article III, § 4 of the Oklahoma Constitution, Pet. App. D, makes it quite clear that the State's purpose in enacting a voter registration law is to detect and punish fraud and to protect the purity of the ballot by properly identifying individual voters so that elections can be conducted in an orderly manner. Okla. Stat., tit. 26, § 4-112 (Supp. 1978), states that " . . . persons not affiliated with any political party recognized by the laws of the State of Oklahoma shall be designated as Independents." Thus, it is clear that a person wishing to register to vote in Oklahoma may do so only if he designates himself as a member of the "recognized" political parties in Oklahoma, i.e., Democrat or Republican, or as an Independent. The Oklahoma Election Laws therefore relegate a potential registrant to the plight of classifying himself, and thus his political ideas, in one of only three categories at the present time, none of which he may agree with or wish to be affiliated with.

Requiring a potential registrant to designate himself as one of the aforesaid state recognized categories, infringes upon that person's right of political association because "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown, supra,* at 745. The Oklahoma laws in question thus place burdens on two rights: the right of individuals to associate for the advancement of political beliefs,

and the right of qualified voters, regardless of their political persuasion to cast their votes effectively. It is the Libertarians' position that they can make a political statement merely by registering as Libertarians and also by casting their vote while registered as Libertarians. Petitioners submit to this Court that there is no compelling State interest in prohibiting a person from merely registering to vote and at that time stating his political affiliation *with any party of his choice,* or as an Independent.

CONCLUSION

For all the reasons stated herein, Petitioners submit that it is clear that the Court of Appeals below erred in not following the teaching of this Court on the use of historical election experiences and data and the strict scrutiny standard of the "least drastic means" to achieve a "compelling state interest," which should be used in a case such as the instant one. Further, this case is one of first impression as to the question of how far a state may go in increasing ballot access requirements when the old requirements served well the legitimate state interest. Finally, issues of first impression are presented to this Court in the instant case as to the questions of whether the filing fee alternative for Independent candidates only discriminates against third party candidates and whether an individual should be able to register to vote even as a member of a non-recognized political party.

Wherefore, premises considered, Petitioners respectfully submit that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Counsel for Petitioners
*Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 81-1379

Filed Oct. 14, 1982

ANATOLY ARUTUNOFF, KATHIE M. LEE, BEVERLY CHANSOLME, BOB MILLER, TOM LAURENT, PAUL WOODARD, JIM SESSIONS, THOMAS G. WINTER, DAN PHILLIPS, LYNN CRUSSEL, AND GORDON MOBLEY,

Plaintiffs-Appellants,

v.

THE OKLAHOMA STATE ELECTION BOARD, GRACE HUDLIN, CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; DREW NEVILLE, VICE CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; AND LEE SLATER, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD,

Defendants-Appellees.

September Term – October 14, 1982

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

This matter comes on for consideration of the petition for

rehearing and suggestion for rehearing in banc filed by appellants, Anatoly Arutunoff, et al., in the captioned appeal.

In connection therewith, Judge McWilliams and Judge Breitenstein voted to deny the petition for rehearing. Judge Seymour voted to grant rehearing.

In connection with the further suggestion that the appeal be reheard in banc, Judge Seymour requested a vote on such suggestion.

The Clerk transmitted the suggestion to the members of the panel and the judges of the court who are in regular active service, and a vote was taken.

Chief Judge Seth, and Circuit Judges Holloway, McKay, and Seymour voted to grant rehearing in banc.

Circuit Judges McWilliams, Barrett, Doyle and Logan voted to deny rehearing in banc, which resulted in a tie vote on the suggestion.

Accordingly, it is ordered:

1. The petition for rehearing is denied.

2. The suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 81-1379

ANATOLY APUTUNOFF, KATHIE M. LEE, BEVERLY CHANSOLME, BOB MILLER, TOM LAURENT, PAUL WOODARD, JIM SESSIONS, THOMAS G. WINTER, DAN PHILLIPS, LYNN CRUSSEL, AND GORDON MOBLEY,
Plaintiffs-Appellants,
v.

THE OKLAHOMA STATE ELECTION BOARD, GRACE HUDLIN, CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; DREW NEVILLE, VICE CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; AND LEE SLATER, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Oklahoma

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Decided and Filed September 3, 1982

Before: McWILLIAMS, SEYMOUR AND BREITENSTEIN, Circuit Judges.

McWILLIAMS, Circuit Judge. Eleven persons, all residents of the State of Oklahoma and registered members

of the Libertarian Party of Oklahoma, brought a class action suit pursuant to 42 U.S.C. § 1983 (1976) against the Oklahoma State Election Board and various Oklahoma election officials, claiming that their rights under the first and fourteenth amendments to the United States Constitution were about to be violated by the defendents acting under the color of state law. The plaintiffs' request for a preliminary and permanent injunction was denied. Upon trial, the district court denied the plaintiffs' request for declaratory, injunctive and other relief, and dismissed the cause of action. Plaintiffs appeal. We affirm.

On June 13, 1980, the Libertarian Party in the State of Oklahoma gained status as an officially-recognized political party in Oklahoma, having filed with the Oklahoma State Election Board a petition bearing the requisite number of valid signatures of registered voters as required by Okla. Stat. tit. 26, § 1-108 (1971 & Supp. 1974), i.e., five percent of the total votes cast for the office of Governor of Oklahoma in the general election of 1978. The members of the Libertarian Party then were allowed to register as Libertarians and the party itself nominated candidates for elective offices to be filled at the general election on November 4, 1980.

At the 1980 general election, the Libertarian Party's nominee for President of the United States received only 1.2 percent of the total Oklahoma vote for that office. Okla. Stat. tit. 26, §§ 1-109, -110 (1971 & Supp. 1974) provide, *inter alia*, that any recognized political party whose nominee for President fails to receive at least ten percent of the total votes cast for that office shall cease to be recognized as an official political party in the State of Oklahoma and that the party affiliation of those persons registered as members of that formerly- recognized party shall be changed to that of "Independent." Under Oklahoma law, state election officials were therefore re- quired to recognize the Libertarian Party's poor showing in the general election by decertifying the party and its members. Seek ing to prevent this state action, and apparently unwilling to go through the petition procedure

necessary to re-establish itself as an official political party, the Libertarian Party filed the present action on November 7, 1980. The Libertarians sought to enjoin the Oklahoma election officials from decertifying the Libertarian Party of Oklahoma and from removing from the voter rolls the party affiliation of members of the Libertarian Party and changing the party affiliation to Independent.

As indicated, upon trial, the trial judge held in favor of the defendants and dismissed the lawsuit. By subsequent action of the defendants, the Libertarian Party of Oklahoma has now ceased formally to exist, and its members have been designated as Independents. It is from the dismissal of their civil rights action that the plaintiffs appeal.

The plaintiffs frame the issues on appeal as follows:

(1) Okla. Stat. tit. 26, § 1-109 (1971 & Supp. 1974), which provides, *inter alia,* that a recognized political party whose nominee for President of the United States fails to receive at least ten percent of the total votes cast for that office shall cease to be a recognized political party, is not framed in the least restrictive manner necessary to achieve legitimate state aims in regulating ballot access, and therefore is violative of plaintiffs' rights under the first and fourteenth amendments;

(2) Okla. Stat. tit. 26, § 1-110 (1971 & Supp. 1974), which provides, *inter alia,* that the registered party affiliation of a member of a political party which ceases to be recognized as such shall be changed to "Independent," also is violative of plaintiffs' first and fourteenth amendment rights; and

(3) Okla. Stat. tit. 26, § 5-112 (1971 & Supp. 1978) and Okla. Stat. 26, § 10-101.1 (1971 & Supp. 1977), relating to independent candidates for office, violate plaintiffs' first and fourteenth amendment rights because the statutes in question discriminate in favor of independent candidates for office and against third party candidates for office.

A state has a legitimate interest in requiring a showing of a "significant modicum of support" before it prints on the state election ballot the name of a political party and its slate of candidates. This serves the important state interest of avoiding "confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971). Furthermore, the states "have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections." *Clements v. Fashing*, _____U.S._____, 102 S.Ct. 2836, 73 L.Ed. 2d 508 (1982). Thus, reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections are not constitutionally infirm, *per se*. *Id.* A State's election laws, however, cannot operate so as to freeze the political status quo. They must recognize the fact that there is a constant fluidity in the fortunes of political parties, particularly minor political parties. Thus, the courts have invalidated state ballot access laws that are oppressive and make it virtually impossible for any but the two major parties to achieve ballot positions for their candidates. *Williams v. Rhodes*, 393 U.S. 23, 25, 89 S.Ct. 5, 7, 21 L.Ed. 2d 24 (1968); *McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980).

In Oklahoma, a new political party can be formed at any time, except during the period between July 1 and November 15 of any even-numbered year. Party formation is accomplished by the filing of a petition seeking recognition of such party. The petition must bear the signatures of registered voters equal to five percent of the total votes cast in the preceding general election for either President or Governor.* Once recognized,

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*The Governor of the State of Oklahoma, like the President of the United States, serves a four-year term. Candidates for the office of Governor of the State of Oklahoma and electors for the office of President of the United States run in alternative, even-numbered years.

the political party may present a slate of candidates whose names will appear on the ballot at the general election. Under Oklahoma law, however, any recognized political party whose candidate for either President or Governor fails to receive at least ten percent of the total votes cast for such office ceases to be a recognized political party, and thereafter it may regain recognition only by following the procedures prescribed for formation of new political parties. Once a recognized political party officially ceases to exist because of its failure to meet the ten percent requirement, its members are reclassified as Independents.

The issue here presented is whether these Oklahoma ballot access restrictions unduly burden the plaintiffs' first and fourteenth amendment rights to political association and ballot access. After careful examination of the challenged statutes, we have determined that these Oklahoma election laws can withstand close scrutiny, that they advance compelling state interest, and that they accomplish important state goals without unduly burdening the constitutional rights of political parties and their members. We are thus in accord with the trial court's judgment.

The United States Supreme Court has written extensively on the subject of state election laws and the restraints which the United States Constitution imposes thereon, starting with *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), and following with such cases as *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed. 2d 554 (1971); *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *American Party of Texas v. White,* 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); and *Clements v. Fashing,* _____U.S._____, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). From our reading of those cases, we fail to perceive any hard-and-fast general rule or standard by which to measure state ballot access laws. In our view, it would appear that each case must be resolved on its own facts after due consideration is given to the practical effect of the election laws of a given state,

viewed in their totality. See *Clements v. Fashing*, _____U.S._____, 102 S.Ct. 2836, 73 L.Ed2d 508 (1982). If, for example, the ballot access restrictions of a state's election laws are deemed by the judiciary to be unnecessarily oppressive, the courts have declared such laws to be unconstitutional. See *McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980).

In the instant case, we conclude that Oklahoma's ballot access election laws are not unduly oppressive. In our view, to require a new political party to demonstrate that it has some degree of political support by obtaining the signatures of registered voters equal to five percent of the total votes cast in the preceding general election for either President or Governor is not unreasonable. Similarly, to require a political party to garner ten percent of the votes cast in an election in which it had candidates as a prerequisite to continuing recognition as a political party is not unconstitutional, *per se*. Moreover, once a recognized political party ceases to exist it would follow that its members can no longer be carried on the voter rolls as registered members of such defunct party. And, of course, even though a political party has ceased officially to exist because of its failure to meet the ten percent requirement, its members thereafter can regain recognition by following the petition procedures prescribed for the formation of a new political party, which, in the instant case, the Libertarians of Oklahoma did in 1980.

Earlier Oklahoma statutes, which have been repealed, provided that any political party could gain official recognition through the presentment of a petition bearing the names of 5,000 registered voters, Okla. Stat. tit. 26, § 229 (repealed 1975), and that a recognized political party would cease to exist if it failed to receive ten percent of the votes cast for the party receiving the highest number of votes at the *two* preceding general elections, Okla. Stat. tit. 26, § 111 (repealed 1975). Counsel argues that these repealed statutes demonstrate that there is a way of governing minor political parties which is less restrictive than the means prescribed by present statutes. We are not impressed with this argument. Admittedly, the repealed

statutes are somewhat less restrictive than the present statute, although, in our view, not markedly so. We do not believe, however, that such fact standing alone, requires a reversal. The ultimate test is whether the particular election laws under attack, when considered in connection with other related election laws, unduly encourage maintenance of the political status quo or are oppressive to a degree that stifles the exercise of first amendment rights. As indicated, we do not believe the present laws to be constitutionally infirm.

In this general connection, we note that at the general election held in 1980, the Libertarian Party in Oklahoma received only 1.2 percent of the total votes cast for the office of President. This being the case, if the plaintiffs are to obtain ultimate relief in the present proceeding, as concerns decertification, it is necessarily their position that any election law requirement is unconstitutional if it demands that a recognized political party receive *more* than 1.2 percent of the total votes cast as a condition for continuing as a recognized political party.

The Libertarians also argue that, under Oklahoma law, minor political parties are dealt with differently than independent candidates and that such discrimination violates their fourteenth amendment rights. In this regard, counsel points out that in order to gain recognition as a political party, the Libertarians in Oklahoma must present a petition bearing the signatures of five percent of the total votes cast in the last general election for either President or Governor, Okla. Stat. tit. 26, § 1-108 (1971 & Supp. 1974), whereas a would-be independent candidate for state office need only file a petition signed by five percent of all registered voters, or, alternatively, by paying a filing fee, Okla. Stat. tit. 26 § 5-112 (1971 & Supp. 1978). We are not persuaded by this argument. A political group becoming a recognized political party and offering to the electorate a slate of candidates is far different than one individual becoming an independent candidate to run for a particular office. As stated in *Storer v. Brown*, 415 U.S. 724, 745, 94 S.Ct. 1274, 1286, 39 L.Ed. 2d 714 (1974), "the political party and the independent

candidate approaches to political activity are entirely different." It is our view, therefore, that the states need not treat minor political parties and independent candidates identically in order for state laws to withstand constitutional challenge.

Judgment affirmed.

SEYMOUR, Circuit Judge, dissenting. I am unable to concur in the majority opinion for the reasons set out below.

The challenged statutes, which took effect in 1975, substantially restrict the ability of a minority party to gain recognized status. Recognition is a legal prerequisite to a party's ability to place candidates on the ballot for state elections. Prior to 1975, Oklahoma required a new political party to submit a petition containing the names of 5,000 voters in order to field candidates for office. Okla. Stat. tit. 26 § 229 (1971), *repealed by* 1974 Okla. Sess. Laws ch. 153, § 17-114. Under the new law, the party must obtain signatures equalling five percent of the total votes cast in the last general election. Okla. Stat. tit. 26, § 1-108 (Supp. 1975).[1] Since 1974, between 770,000 and 1,150,000 people have voted in each general election. Oklahoma Election Board, *Directory of Oklahoma 1981* at 652. Therefore, a new political party now must collect well over 35,000 signatures to gain recognition.

[1] The requirements for ballot access by minority parties contrast with those for Independent candidates. An Independent candidate may get on the ballot by either filing a petition with signatures of five percent of the eligible voters or simply by paying a filing fee. Okla. Stat. tit. 26 § 5-112 (Supp. 1975). This requirement must also be met by party candidates. *Id.* The Oklahoma Supreme Court has upheld the filing fee option as a means of ballot access for Independent candidates. *Burns v. Slater,* 559 P.2d 428 (Okla. 1977) (no violation of equal protection vis-à-vis indigent candidates). An Independent who wishes to run for President must file a petition containing signatures of three percent of the total votes cast in the last presidential election. Okla. Stat. tit. 26, § 10-101.1 (Supp. 1978). *Cf. McClendon v. Slater,* 554 P.2d 774 (Okla. 1976) (candidates of American Party whose registration was changed to Independent when party lost recognized status not entitled to run as Independents because they were not truly "independent" but had allegiance to a party, *cert. denied,* 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977).

The Oklahoma gubernatorial election occurs every four years, alternating every two years with the presidential general election. Because voter turnout is historically much higher for presidential general elections, the new law has substantially restricted a minority party's ability to field candidates in a gubernatorial general election. For example, recognition in 1982, a gubernatorial election year, would require 57,485 signatures (based on total votes in the previous presidential election), while recognition in 1980, a presidential election year required 38,870 (based on total votes in the previous gubernatorial election). *Id.*

The ability of a party to retain official status is also restricted. Under the former statute, a political party ceased to exist if in two consecutive general elections it received less than ten percent of the votes cast for the *party* receiving the highest number of votes. Okla. Stat. tit. 26 § 111 (1971), *repealed by* 1974 Okla. Sess. Law ch. 153, § 17-114. Under the new law, the minority party's nominee for Governor or President must receive ten percent of the *total* votes cast for said office in the general election in order for the minority party to retain its status.[2] Okla. Stat. tit. 26, § 1-109 (Supp. 1975). If a minority party fails to retain its recognized status, no voters may register as members of that party and the affiliation of all registered members is changed to Independent. Okla. Stat. tit. 26, § 1-110 (Supp. 1975).

The threshold issue in this case is the level of judicial scrutiny to which these Oklahoma election laws must be subjected. Ballot access restrictions burden two fundamental rights protected by the Constitution, the right to political association and the right to cast votes effectively. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99

[2] Because the election turnout in a presidential year is significantly greater than in a gubernatorial year, the retention requirement is much more stringent after a presidential election. This problem was avoided under the old law which permitted retention if a party received 10% of the votes cast in either of the two preceding general elections.

S.Ct. 983, 990, 59 L.Ed.2d 230 (1979) (citing *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed. 2d 24 (1968)). The Supreme Court has held that when such "vital individual rights are at stake," the state must establish a "compelling interest" and must "adopt the least drastic means to achieve [its] ends." *Id.* 440 U.S. at 184-85, 99 S.Ct. at 990-91; *accord McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980). This is the traditional articulation of strict judicial scrutiny that is applied when state laws burdening fundamental rights are analyzed.

The recent Supreme Court opinion of *Clements v. Fashing*, _____U.S._____, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982), cited by the majority opinion, is not a retreat by the Court from the use of strict scrutiny in voter access cases. Part V of that opinion, representing the Opinion of the Court, concluded that the First Amendment interests there at stake were so insignficant as to be *de minimus*. Therefore the restrictions could be "upheld consistent with traditional equal protection principles." *Id.* 102 S.Ct. at 2848. The burdens imposed by the Oklahoma statutes on the First Amendment rights in this case are not similarly insubstantial.

The plurality's mode of analysis in *Clements*, set forth in Part III of the opinion, rejected "'heightened' equal protection scrutiny." *Id.* at 2845 (Rehnquist, J.). The majority of the Court, however, clearly did not concur in the plurality's equal protection analysis. *See id.* at 2850 n.1 (Brennan, Jr., dissenting). Moreover, even the plurality acknowledged that the established precedents have applied strict scrutiny in "ballot access cases involving classification schemes that impose burdens on new or small political parties or independent candidates." *Id.* at 2844 (Rehnquist, J.) (citing *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *Jenness v. Fortson*, 403 U.S. 731, 91 S.Ct. 1970, 29 L.Ed.2d 554

(1971); *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5,7 L.Ed.2d 24 (1968)). Rather than attempting to repudiate that line of cases, the plurality distinguished them as inapplicable because the restriction in *Clements* did not burden minority parties or independent candidates. *Clements* involved restrictions against certain office-holders in Texas running for other offices during their terms. *Id.* According to Justice Rehnquist, the challenged provisions "discriminate[d] neither on the basis of *political affiliation* nor on any factor not related to a candidate's qualifications to hold political office." *Id.* 102 S.Ct. at 2846 (emphasis added).

Unlike *Clements,* the instant case *does* involve ballot access restrictions burdening minority parties. We are therefore mandated by the Supreme Court cases to apply strict scrutiny. The state laws cannot stand unless they "further compelling state interests . . . that cannot be served equally well in significantly less burdensome ways." *American Party of Texas v. White,* 415 U.S. 767, 780-81 94 S.Ct. 1296, 1305-06, 39 L.Ed.2d 744 (1974), The district court in this case specifically found that means less restrictive than those embodied in the challenged statutes are available to Oklahoma to achieve its goal. However, the court concluded that established law does not require use of the least restrictive means. This legally erroneous statement is affirmed by the majority opinion, which would substitute "not unduly burdensome" or "not unnecessarily oppressive" or "least restrictive." In light of the recent Supreme Court opinions, I do not believe we are free to thus abandon strict scrutiny analysis and impose a less stringent standard.

I find it significant that the State did not need to change its voting laws to prevent frivolous or fraudulent candidates from gaining access to the ballot, to avoid voter confusion, or to prevent the burden of runoff elections. The record establishes that ballot overcrowding did not plague Oklahoma elections with these problems before the ballot access requirements were made more stringent. The American Independent Party in 1968 was the only party to gain recognition in the thirty years before the

enactment of the new provisions. Numerous decisions have considered such state experience relevant in ballot access cases. *E.g., American Party of Texas v. White,* 415 U.S. at 779, 783-84, 94 S.Ct. at 1305, 1307-08 (restrictions upheld where satisfaction of requirements by two small parties indicated requirements were not onerous); *Storer v. Brown,* 415 U.S. at 742, 94 S.Ct. at 1285 (remand to determine regularity with which Independents had previously gained access to ballot); *Jenness v. Fortson,* 403 U.S. at 439, 91 S.Ct. at 1974 (restrictions upheld where recent candidates for Governor and President had gained ballot designation by procedure complained of and won plurality of votes at general election); *Williams v. Rhodes,* 393 U.S. at 33, 89 S.Ct. at 11 (restrictions struck down where "the experience of many States . . . demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required."); *McLain v. Meier,* 637 F.2d at 1165 (restrictions struck down where "third parties have not qualified for ballot position in North Dakota with regularity, or even occasionally").

Because the record reflects that the prior Oklahoma laws constitute less restrictive means of satisfying Oklahoma's legitimate interest in protecting the integrity of its political processes, I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 81-1379

(D.C. No. 80-1273-W)

ANATOLY ARUTUNOFF, KATHIE M. LEE, BEVERLY CHANSOLME, BOB MILLER, TOM LAURENT, PAUL WOODARD, JIM SESSIONS, THOMAS G. WINTER, DAN PHILLIPS, LYNN CRUSSEL, AND GORDON MOBLEY,
Plaintiffs-Appellants,

v.

THE OKLAHOMA STATE ELECTION BOARD, GRACE HUDLIN, CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; DREW NEVILLE, VICE CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; AND LEE SLATER, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD,
Defendants-Appellees.

JULY TERM – September 3, 1982

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein, and Honorable Stephanie K. Seymour, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the [Western] District of [Oklahoma], and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

A true copy

Teste

Howard K. Phillips
Clerk U.S. Court of
Appeals, Tenth Circuit

By /s/ Rosalyn Peterson
Deputy Clerk

Issued as Mandate: November 1, 1982

Filed in U.S. Dist. Ct.: November 5, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-80-1273-W
Filed Mar. 2, 1981

ANATOLY ARUTUNOFF, KATHIE M. LEE, BEVERLY CHANSOLME, BOB MILLER, TOM LAURENT, PAUL WOODARD, JIM SESSIONS, THOMAS G. WINTER, DAN PHILLIPS, LYNN CRUSSEL, AND GORDON MOBLEY,
Plaintiffs,

v.

THE OKLAHOMA STATE ELECTION BOARD, GRACE HUDLIN, CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; DREW NEVILLE, VICE CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; AND LEE SLATER, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD,
Defendants.

JUDGMENT

This Court finds that the plaintiffs' allegations that 26 O.S. §§ 1-102, 1-109, 1-110, 4-112, and 5-104 are violative of their federal constitutional rights are without merit. The plaintiffs' prayer for declaratory, injunctive, and other relief is hereby DENIED and the cause is DISMISSED.

IT IS SO ORDERED this 2nd day of March, 1981.

/s/ Lee R. West
United States District Judge

Entered in Judgment Docket on 3-2-81

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-80-1273-W

ANATOLY ARUTUNOFF, KATHIE M. LEE, BEVERLY CHANSOLME, BOB MILLER, TOM LAURENT, PAUL WOODARD, JIM SESSIONS, THOMAS G. WINTER, DAN PHILLIPS, LYNN CRUSSEL, AND GORDON MOBLEY,
Plaintiffs,

v.

THE OKLAHOMA STATE ELECTION BOARD, GRACE HUDLIN, CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; DREW NEVILLE, VICE CHAIRMAN OF THE OKLAHOMA STATE ELECTION BOARD; AND LEE SLATER, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD,
Defendants.

MEMORANDUM OPINION

Before the Hon. Lee R. West, United States District Judge.

The plaintiffs are all members of the Libertarian Party of Oklahoma. They have brought this action seeking a determination that the election laws of Oklahoma which govern the award and retention of recognized party status are violative of the U.S. Constitution. The individual defendants are members of the Oklahoma State Election Board and are responsible for administering the election laws.

The Libertarian Party gained status as an officially recognized political party under the laws of Oklahoma on June 13, 1980. This recognition was obtained by filing with the Election Board petitions bearing the requisite number of valid

signatures of registered voters as required under 26 O.S. § 1-108. After being recognized as an official political party, the members of the Libertarian Party were allowed to officially register to vote as Libertarians and were entitled to nominate candidates for the elective offices to be filled at the next succeeding General Election. 26 O.S. §§ 93.42, 1-102 *et. seq.*

The Libertarian Party entered several party candidates in various contests included in November 1980 General Election. After that election had been concluded, the Libertarian Party was confronted with the prospect of losing its status as an officially recognized party under the provisions of 26 O.S. § 1-109. That section provides:

> Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. Said party may regain recognition only by following the procedure prescribed for formation of new political parties. The State Election Board shall proclaim the fact of a party's failure to receive a sufficient number of votes and shall order that said party cease to be recognized.

The Libertarian Party nominees for Presidential Elector acquired only 1.2 percent of the total Oklahoma vote for President and Vice President. Pursuant to 26 O.S. § 1-109, the defendant Election Board proclaimed that the party would cease to be recognized. Pursuant to § 1-110, the Election Board caused the party affiliation of registered Libertarians to be changed to "Independent" which reflects a lack of affiliation with any recognized party. Additionally, the Libertarian Party will not be able to nominate candidates for the next General Election except that it may do so by again qualifying as a new party under the provisions of § 1-108.

The plaintiffs seek to reverse this "de-recognition" process on the grounds that the Oklahoma Election laws violate rights

secured to them by the U.S. Constitution. More specifically, the plaintiffs have alleged that the election laws violate the Guarantee of equal protection of the laws found in the Fourteenth Amendment to the U.S. Constitution and the right of free political association found in the First Amendment. The equal Protection clause is invoked by the plaintiffs on the ground that the requirements for obtaining a position on the general election ballot are more difficult for a party candidate than an independent candidate. The First Amendment right is invoked by the plaintiffs' proposition that the relevant election laws infringe on a fundamental right and are constitutionally infirm because they are not framed in the lease restrictive means possible.

The Equal protection argument is both curious by its inclusion in this matter and lacking in persuasiveness. In essence, the plaintiffs have contended that the Oklahoma election laws discriminate unlawfully in favor of independent candidates as compared with party candidates. The basis for this contention is the requirement that a person desiring to run as an independent candidate for office must file petitions containing the valid signatures of three percent (3%) of the total vote cast for governor or presidential elector in the preceding general election. In comparison, those groups wishing to gain recognition as an official party with the capacity to nominate candidates for office must file petitions containing five percent (5%) of the same total vote.

The fallacy in this argument is the tremendous difference between qualifying a person to run for one office in one election and qualifying a party to nominate numerous persons for the various offices included on the general election ballot. As noted by the U.S. Supreme Court in *Storer v. Brown,* 415 U.S. 724, 745, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), " . . . the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." The Supreme Court went on to highlight the character of a political party as an ongoing,

statewide organization which seeks to have impact through the state by electing a number of affiliated persons to various offices. Formation of a political party also involves responsibilities for holding party conventions, participation in primaries, etc. The sum of these considerations being that the political party is so substantially different from independent candidates as to justify the application of somewhat different qualification standards to each. As the defendants have emphasized, all political parties should be treated in a substantially equal manner under the election laws and all independent candidates should be treated equally. There is no basis, however, for requiring that independent candidates and political parties be subject to the same voter signature requirements in obtaining a place on the ballot or official recognition.[1]

The plaintiffs' second proposition begins by acknowledging the state's right to implement laws to regulate access to the ballots. This state right is founded on the state interest in requiring that a political party show a modicum of popular support in order to gain a place on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 24 L.Ed.2d 554 (1971). These requirements are deemed necessary to prevent the ballot from being overcrowded with political candidates and to avoid resultant voter confusion and discouragement.

Accepting the above premise, the plaintiffs go on to suggest that in all laws which may affect the First Amendment right of political association and the related rights to vote and of reasonable ballot access must be framed in the least restrictive manner possible. In support of this proposition, the plaintiffs have cited *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Lubin v.*

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[1] A challenge which was substantially similar to this one was rejected in *Jackson v. Ogilvie*, 325 F.Supp. 864, 867-69 (N.D. Ill.) (Three-Judge Court), *aff'd without opinion*, 403 U.S. 925, 91 S.Ct. 2247, 29 L.Ed.2d 705 (1971) *but see, Ill. Election Board v. Socialist Workers Party*, 440 U.S. at 179-182 (limiting issues decided by *Jackson v. Ogilvie*).

Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) and *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

The final aspect of the plaintiffs' argument is that the ten percent (10%) requirement for retention of recognized party status is not the least restrictive means to achieve the recognized state interest in regulating access to the ballot.

The Court finds it easily credible that the State of Oklahoma could require political parties to achieve a percentage of votes less than is now required and still achieve its goal of restricting ballot access to those parties which have a minimum of popular support. The Court cannot conclude, however, that the plaintiffs have shown either that the restriction involved herein requires that the state adopt a percentage requirement that is the lowest possible or that there is any cognizable basis for this Court requiring that the state lower the percentage requirement from its current level.

This Court has recently considered issues of ballot access and state interest in regulating the same in *Crussel v. Oklahoma State Election Board,* 497 F.Supp. 646 (W.D. Okla. 1980). As a part of this Court's decision that certain Oklahoma election laws were violative of the plaintiff's constitutional right to free political association, reliance was placed in part on the principle that laws in this area should be framed in their least restrictive mode. Specifically, this Court held that a law which was proposed to prevent opportunistic party-swapping had an impermissible effect in preventing a person from moving from unaffiliated status to affiliation with a newly recognized party. This Court concluded that the subject law excluded persons from the ballot in a manner inconsistent with the state interest which justified the legislation and that the law could be framed in a less restrictive manner to avoid this effect. 497 F.Supp. at 651.

The particular sections of the election law involved in this present action are designed to regulate the official recognition of political parties. Simply stated, a new party must gather

petitions signed by five percent of those who voted in the preceding general election in order to gain official recognition and the benefits thereof. The party may retain recognized status by obtaining ten percent of the votes cast in the next general election. If the party fails to obtain the ten percent then they may regain official recognition by again gathering petitions signed by five percent (5%) of those who voted in the preceding election. This law works as the legislature intended. It assures that the parties on the ballot have a minimum of continuing popular support. No parties are inadvertantly excluded by an unintended effect of the law. The full effect of these sections is to pursue the recognized state interest. Consequently, the election law in this case differs from that which was found objectionable in *Crussel v. Okla. State Election Board.*

The plaintiffs would have this Court declare these sections violative of their constitutional rights for not using the lowest percentage requirement possible to pursue the recognized state interest. The plaintiffs have failed, however, to demonstrate to the Court that established law would demand that the state apply the lowest possible percentage in this situation. Two of the cases relied upon by the plaintiffs, *Lubin v. Panish, supra,* and *Bullock v. Carter, supra,* involved election codes requiring payment of filing fees to qualify as a candidate for office without an alternative means of access for those unable to pay the fee. The Supreme Court held in these cases that the election codes were "extraordinarily ill-fitted" to the state interest of preventing frivolous candidates because the filing fee requirement excluded legitimate as well as frivolous candidates; the only certain effect of the law was to excluded candidates without significant finances.

The third case relied on by the plaintiffs for their position, *Illinois Elections Board v. Socialist Workers Party, supra,* involved an election code which required some city and local candidates to obtain more petition signatures than statewide candidates. Within the context of equal protection considerations, the Supreme Court concluded that the lesser requirement

applied to the statewide candidates must also be applied to the city and local candidates.

The Court is unaware of any authority that would require the state to use the lowest possible percentage in the election laws in the case now at bar and the plaintiffs have failed to produce any such authority. The plaintiffs have pointed to many other states which have lower numerical requirements for acquiring or retaining recognized party status. These laws from other states can be taken to reflect no more than the subjective judgments of other state legislatures as to what number of votes or petition signatures constitutes a sufficient showing of popular support to warrant official recognition of a political party. The percentage requirements of this state are reasonable and in the range of those required by other states. Therefore, this Court finds no basis for substituting its judgment or the judgment of other states for that of the Oklahoma state legislature on what number of votes or petition signatures should be required for official political party recognition. *See, Jenness v. Fortson, supra; Barnhart v. Mandel,* 311 F.Supp. 814 (D.Md. 1970).

The Oklahoma election laws provide for reasonable access to the ballot for political parties and is not violative of either the Fourteenth or First Amendments as contended by the plaintiffs in this action. The injunctive and declaratory relief sought by the plaintiffs is hereby DENIED and the cause is DISMISSED.

The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a), F.R.Civ.P. Judgment will be entered in accordance with this opinion.

IT IS SO ORDERED this *2nd* day of March, 1981.

/s/ Lee R. West
United States District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

U.S. CONST., AMEND. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress.

* * * *

Okla. Const., Art. III, § 3 (Amended 1978)

The Legislature may enact laws providing for a mandatory

primary system which shall provide for the nomination of all candidates in all elections for federal, state, county and municipal offices, for all political parties, except for the office of Presidential Elector, the candidates for which shall be nominated by the recognized political parties at their conventions. The Legislature also shall enact laws providing that citizens may, by petition, place on the ballot the names of independent, nonpartisan candidates for office, including the office of Presidential Elector.

* * * *

Okla. Const., Art. III, § 4 (Amended 1978)

The Legislature shall prescribe the time and manner of holding and conducting all elections, and enact such laws as may be necessary to detect and punish fraud in such elections. The Legislature may provide by law for the registration of electors throughout the state and, when it is so provided, no person shall vote at any election unless he shall have registered according to law.

* * * *

Okla. Stat., tit. 26 § 111, Laws 1913, Ch. 157, p. 318, § 9
(Repealed January 1, 1975)

A political party is an affiliation of electors representing any political organization which, at the next general election preceding, polled for President or Governor at least five per centum of the entire vote cast for either of said respective officers, or any such political organization which may have polled at least ten per centum of the vote of as many as three other states at the last election held in such states. Such political parties shall nominate their candidates as all other political parties and be governed by laws regulating the same. And such political parties shall in no way use or conflict with the name of other political parties in the state. When such political parties fail to receive at two general elections, following each other, ten per centum of the vote cast for the party receiving the highest

number of votes, it ceases to be a party. At the primary election held in August, 1914, any party which has a national recognition as a party shall be recognized as a political party in Oklahoma.

* * * *

Okla. Stat., tit. 26, § 229 Laws 1923-24, Ch. 151, p. 214
(Repealed January 1, 1975)

Any political party presenting a petition of 5000 names of voters of Oklahoma, to the Secretary of State, and the same being approved by the Secretary of State, the Secretary of the State Election Board shall then place the names of the candidates of the party submitting said petition on a ballot similar to that of the major parties in Oklahoma, and it shall be mandatory on the part of the Secretary of the Election Board to prepare said ballot when said petition has been approved by the Secretary of State, and upon filing and approval of said petition for State Officers shall be sufficient to permit candidates for Congress, District Judge or other minor offices appearing on the State and County ticket.

* * * *

Okla. Stat., tit. 26, § 1-102 (Supp. 1977)

A Primary Election shall be held on the fourth Tuesday in August of each even-numbered year, at which time each political party recognized by the laws of Oklahoma shall nominate its candidates for the offices to be filled at the next succeeding General Election, unless otherwise provided by law. No candidate's name shall be printed upon the General Election ballot unless said Candidate shall have been nominated as herein provided, unless otherwise provided by law; provided further that this provision shall not exclude the right of a non-partisan candidate to have his name printed upon said General Election ballots. No county, municipality or school district shall schedule an election on any date during the twenty (20) days immediately preceding the date of any such primary election.

* * * *

Okla. Stat., tit. 26, § 1-108 (Supp. 1974)

A group of persons may form a recognized political party at any time except during the period between July 1 and November 15 of any even-numbered year if the following procedure is observed:

1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of the State Election Board at any time except during the period between March 1 and November 15 of any even-numbered year.

2. Within ninety (90) days after said notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with said Secretary, bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice President. Each page of said petitions must contain the names of registered voters from a single county.

3. Within thirty (30) days after receipt of said petitions, the State Election Board shall determine the sufficiency of said petitions. If said Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto.

* * * *

Okla. Stat., tit. 26, § 1-109 (Supp. 1974)

Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. Said party may regain recognition only by following the procedure prescribed for formation of new political parties. The State Election Board shall proclaim the fact of a party's failure to receive a sufficient number of votes and shall order that said party cease to be recognized.

* * * *

Okla. Stat., tit. 26, § 1-110 (Supp. 1974)

The secretary of each county election board shall, within sixty (60) days after such proclamation by the State Election Board, change to Independent the party affiliation on the registration form of each registered voter of a political party which ceases to be a recognized political party.

* * * *

Okla. Stat., tit. 26, § 4-112 (Supp. 1976) (Renumbered from § 93.42, Laws 1974, chapter 75, § 12, emerg. eff. April 19, 1974, as § 4-112 by Laws 1976, Chapter 90, § 10, emerg. eff. May 6, 1976.)

The Secretary of the State Election Board shall devise a registration form to be used for registering voters. Said registration form shall contain the following information: Voter's full name and sex, date of birth, height, weight, color of eyes, color of hair, place of residence and mailing address; the name of the political party recognized by the laws of the State of Oklahoma with which the voter is affiliated; an oath of the voter's eligibility to become a registered voter; and such other information as may be deemed necessary by the Secretary to identify said voter and to ascertain his eligibility. Persons not affiliated with any political party recognized by the laws of the State of Oklahoma shall be designated as Independents.

* * * *

Okla. Stat., tit. 26, § 5-104 (Supp. 1974)

Candidates may file for the nomination of a political party only if said party is recognized by the laws of the State of Oklahoma.

* * * *

Okla. Stat., tit. 26, § 5-112 (Supp. 1978)

A Declaration of Candidacy must be accompanied by a petition supporting a candidate's filing signed by five percent

(5%) of the registered voters eligible to vote for a candidate in the first election wherein the candidate's name could appear on the ballot, as reflected by the latest January 15 registration report; or by a cashier's check or certified check in the amount of Two Hundred Dollars ($200.00) for candidates filing with the Secretary of the State Election Board, or in the amount of Fifty Dollars ($50.00) for candidates filing with the secretary of a county election board; provided, however, such cashier's check or certified check shall be in the amount of One Thousand Five Hundred Dollars ($1,500.00) for candidates for Governor, One Thousand Dollars ($1,000.00) for candidates for United States Senator and Seven Hundred Fifty Dollars ($750.00) for candidates for the United States Congress, and Five Hundred Dollars ($500.00) for candidates for Lieutenant Governor, Corporation Commission, Attorney General, State Auditor and Inspector, State Superintendent of Public Instruction, State Treasurer and Commissioner of Insurance.

* * * *

Okla. Stat., tit. 26 § 10-101 (Supp. 1977)

The nominees for Presidential Electors of any recognized political party shall be selected at a statewide convention of said party in a manner to be determined by said party. The nominees for Presidential Electors shall be certified by said party's chairman to the Secretary of the State Election Board no fewer than ninety (90) days nor more than one hundred eighty (180) days from the date of the General Election at which candidates for Presidential Electors shall appear on the ballot. Failure of a political party to properly certify the names of its nominees for Presidential Electors within the time specified shall bar such party from placing any candidates for Presidential Electors on the ballot at said election. Candidates for Presidential Electors seeking to appear on the ballot as uncommitted shall be entitled to have their names placed upon the ballot at a General Election by observing the following procedure:

1. No later than July 15 of a presidential election year, petitions seeking ballot access for said uncommitted candidates

for Presidential Electors, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with said Secretary, bearing the signatures of registered voters equal to at least three percent (3%) of the total votes cast in the last General Election for President. Each page of said petitions must contain the names of registered voters from a single county.

2. Within thirty (30) days after receipt of said petitions, the State Election Board shall determine the sufficiency of said petitions. If said Board determines there are a sufficient number of valid signatures of registered voters, the nominees for Presidential Electors are entitled to appear on the ballot at the next following General Election at which candidates for Presidential Electors shall appear on the ballot.

* * * *

Okla. Stat., tit. 26 § 10-101.1 (Supp. 1977)

The names of a slate of candidates for the office of Presidential Elector pledged to an Independent candidate for President of the United States shall be printed on the ballot only by observing the following procedure:

1. No later than July 15 of a presidential election year, petitions signed by a number of registered voters supporting the candidacy of said candidate for President of the United States equal to at least three percent (3%) of the total votes cast in the last General Election for President shall be filed with the Secretary of the State Election Board. The form of said petitions shall be prescribed by the secretary. Each page of said petitions must contain the names of registered voters from a single county.

2. Within thirty (30) days after receipt of said petitions, the State Election Board shall determine the sufficiency of said petitions.

3. If the petitions are found to be sufficient, the Independent candidate for President of the United States shall, no later than September 1, certify to the Secretary of the State Election Board the names of the nominees for Presidential Elector

pledged to him and the name of his Vice Presidential running mate. Each candidate for Presidential Elector so nominated shall subscribe to an oath stating that, if elected, he will cast his ballot for the candidate who nominated him and for said candidate's Vice Presidential running mate. Said oath shall be filed with the secretary of the State Election Board no later than September 15.

No. 82-1160

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANATOLY ARUTUNOFF, et al.,

Petitioners,

v.

THE OKLAHOMA STATE ELECTION BOARD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

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DEPUTY CHIEF, CIVIL DIVISION

112 State Capitol Building
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Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals balance the appropriate factors in reviewing whether Oklahoma's ballot access requirements for new political parties operated to effectively exclude from the State's political process those reasonably diligent political parties possessing a significant modicum of popular support?

2. Is there any conflict between the Eighth Circuit and Tenth Circuit Courts of Appeals regarding the appropriate standard of review and analytical methodology to be applied by courts called upon to consider challenges to State ballot access restrictions?

3. Is Oklahoma constitutionally obligated to permit political organizations receiving the support of less than 2 percent of the electorate to retain their status as officially recognized political parties or obligated to permit initial ballot access to such organizations without first requiring submission of a petition containing not less than 5 percent of the votes cast for the highest statewide office on the ballot at the last preceding general election?

4. Does the Fourteenth Amendment to the United States Constitution prevent Oklahoma from imposing different ballot access petition requirements on single independent candidates than are imposed upon

organizations seeking political party recognition and the right to field an entire slate of candidates?

5. Is Oklahoma obligated, under the First Amendment to the United States Constitution to permit its citizens to use voter registration forms (which forms serve only to declare in which recognized party primary the registrant chooses to participate) for the expression of personal political sentiment.

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No. 82-1160

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANATOLY ARUTUNOFF, KATHIE M. LEE,
BEVERLY CHANSOLME, BOB MILLER,
TOM LAURENT, PAUL WOODARD, JIM SESSIONS,
THOMAS G. WINTER, DAN PHILLIPS,
LYNN CRUSSEL, AND GORDON MOBLEY,

Petitioners,

v.

THE OKLAHOMA STATE ELECTION BOARD,
GRACE HUDLIN, CHAIRMAN OF THE
OKLAHOMA STATE ELECTION BOARD;
DREW NEVILLE, VICE CHAIRMAN OF
THE OKLAHOMA STATE ELECTION BOARD;
AND LEE SLATER, SECRETARY OF THE
OKLAHOMA STATE ELECTION BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the Oklahoma State Election Board and its constitutent members who were parties to the proceedings below, by and through their counsel, Michael C. Turpen, Oklahoma State Attorney General, by James B. Franks, Assistant Attorney General, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at Arutunoff v. Oklahoma State Election Board, 687 F.2d 1375 (10th Cir. 1982).

COMBINED STATEMENT OF CASE AND STATEMENT OF FACTS

The first appearance of the candidates of the Libertarian Party on an Oklahoma election ballot was in the primary and general elections held in 1980. This followed a successful petition drive in which that organization was able to garner the signatures of not less than 5 percent of the number of persons who had voted for the Office of Governor in 1978. The petitioning process employed in this phase of Oklahoma's ballot access system is quite free and open. A voter may sign such petitions even though he may have also signed others, and voters who have signed such petitions remain free thereafter to participate in the primaries of other recognized parties. Petition signers are not

required to state that they intend to vote for the candidate or party circulating any ballot access petition, and persons who have previously voted in another party's primary or who were not even registered to vote at the time of the previous election are nonetheless entitled to participate in such ballot access petition drives.

In the general election itself, the Libertarian Party demonstrated a near total absence of any reasonable modicum of popular support for their candidates; their most successful statewide votegetter received a mere 1.2 percent of the votes cast. However, retention of the political party recognition earned by means of the petition drive is expressly conditioned upon the achievement by the party of at least 10 percent of the votes cast, and the Libertarian Party has now been decertified as a recognized political party in Oklahoma.

In response to the decertification mandated by Oklahoma ballot access regulations, the Libertarian Party has mounted a three-prong attack on those election laws in the federal courts. The first line of attack is focused upon the percentage of votes required for retention and upon the petition signature requirement for initial access or recertification. It is asserted that under the laws existing prior to 1975, the year Oklahoma election law was comprehensively recodified, the amount of support required for access and retention

provided a more permissive access system than under the present law. Second, the Libertarians complain that independent presidential candidates are able to place their electors on the ballot by means of a 3 percent voter petition or, in the alternative, by paying a filing fee. On the other hand, political party recognition (carrying with it the right to field a slate of presidential electors) requires submission of the 5 percent petition described above. Last, the Libertarians argue that even if they have been properly decertified, subject only to recertification by means of a new petition drive, they must nonetheless be permitted to declare their Libertarian affiliation on their voter registration forms, despite the fact that a nonrecognized political orgnaization may not conduct primary elections.

Throughout the litigation in the district and circuit court, and again in their Petition for Writ of Certiorari, the Libertarians have urged the adoption of a kind of "litmus-paper" test for the validity of Oklahoma's various ballot access mechanisms. Their reasoning seems to be that if Oklahoma permitted what they assert was a less restrictive ballot access system prior to 1975, then how can the regulations imposed in 1975, which they argue are more restrictive, constitute the least restrictive means of satisfying the State's conced-

edly valid and compelling interests which are always present in cases such as these?

However, both the district court and the circuit court have declined to rise to this bait. Instead, these courts have quite properly considered the practical effects of the presently extant ballot access regulations, viewed in their totality, with an eye toward determining whether the particular provisions under attack, when considered in connection with other related election laws, unduly encourage maintenance of the political status quo or are oppressive to a degree that stifles the exercise of First Amendment rights. See, Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982), at 1379-1380. The Libertarians have been denied the relief they seek because these lower courts were convinced that, on balance, Oklahoma's ballot access provisions permit reasonably diligent political parties possessed of a reasonable modicum of popular support to attain and hold their place on the State's election ballots.

The Libertarians' other bases of challenge to the State's election laws are so exotic and unfounded that they appear to be makeweights. There is hardly any basis for insisting that access requirements for independent candidates and party candidates must be identical. The two situations have been consistently recognized as being vastly different. See, e.g., Socialist Workers

Party v. Davoren, 378 F. Supp. 1245 (D.Mass. 1974) (3 judge panel).

Nor is there any readily apparent reason why Oklahoma must permit anyone to use government promulgated voter registration forms for the expression of political sentiment. The purpose of the party affiliation provision on such forms is to permit election officials to know whether a voter is entitled to vote in a party primary. Only recognized parties have such primaries. This highly specialized government form is hardly an appropriate forum for free speech.

Notwithstanding the contrary assertions of the Libertarians, all of these issues were fully considered and properly disposed of by the courts below. All that remains is the question of whether this is a case which properly merits further review by the United States Supreme Court. For the reasons set forth below, it does not.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The predominate question offered for review by the Petitioners presents no justiciable case or controversy within this Court's jurisdiction under the U. S. Const., Art. III, § 2, cl. 1.

The heart of the Petitioner's lawsuit in the courts below, as well as the central focus of their Petition for Writ of Certiorari, is their claim of constitutional injury arising under the provisions of Oklahoma law governing ballot access and recognition retention for new political parties. They also present an equal protection claim based upon disparities between treatment afforded such parties, on the one hand, and independent presidential electors, on the other, as well as a claim they are denied rights of free expression because Oklahoma will not permit them to declare their Libertarian status on their voter registration forms in the absence of official recognition of their organization as a qualified political party. These latter claims, however, are plainly ancillary to the primary thrust of the Libertarian arguments and, in any event, do not present constitutional questions of any real substance.

The jurisdictional problem with the Libertarians' primary claim is that the circumstances of this case render it impossible for this Court to afford them the relief they seek via a decree of conclusive character resulting in a final resolution of this dispute. It is not subject to dispute that the U. S. Const., Art. III, § 2, cl. 1, provides a substantive limitation upon the fundamental power of the federal judiciary, including the United States Supreme Court. In the case of Preiser v.

Newkirk, 422 U.S. 395, 45 L.Ed.2d 272, 95 S.Ct. 2330 (1975), this Court observed that:

> "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in North Carolina v. Rice, 404 U.S. 244, 246, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971), a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" Id. 422 U.S. at 401. (Emphasis added)

This test for the jurisdiction of this Court obligates us to examine the potential effect upon the rights of the Libertarians should they receive the declaratory and injunctive relief they seek. Such inquiry demonstrates that even in such event, the Libertarian organization will not regain its previously held status as a recognized political party. Thus, the decree they ask this Court to grant cannot resolve their problem and will not be conclusive in character.

The reason for this is relatively straightforward. Under Oklahoma law, a court decision holding a statutory provision to be unconstitutional has the effect of reactivating a prior statute which the invalid act has displaced. Ex parte Masters, 258 P. 861, 863 (Okl. 1927); State ex rel. Burns v. Steely, 600 P.2d 367, 368 (Okl.Cr. 1979); C.S.M., Jr. v. State, 599 P.2d 426, 429 (Okl.Cr. 1979). It follows, then, that a decree of this Court granting to the Libertarians the relief they here seek would have the effect of reactivating the provisions of 26 O.S.1971, § 111 and 26 O.S.1971, § 299, which, respectively, govern retention of official recognition by political parties and the attainment of such recognition by new parties.

The Libertarian arguments make much of the fact that the provisions of § 111, supra, condition political party decertification upon failure to attain 10 percent of the vote at two preceding elections, and this is true as far as it goes. The Libertarians lost their certification for their failure to attain as much as 2 percent of the vote at a single election, as required by present law, 26 O.S.Supp.1974, § 1-109. All these statutes have been attached to the Libertarians' Petition as an appendix.

What the Libertarians either overlook or hope to conceal, however, is that their poor showing in the 1980 general elections would have resulted in their loss of

official party recognition, even under the prior law found at § 111. Under that statute:

> "A political party is an affiliation of electors representing any political organization which, at the next general election preceding, polled for President or Governor at least five per centum of the entire vote cast for either of said respective officers . . . ." 26 O.S.1971, § 111. (Emphasis added)

Obviously, under such law, retention of political party official recognition requires more than the attainment of 10 percent of the vote at either of the two last preceding elections. In addition, such an organization must also receive at least 5 percent of the vote at the last preceding election, and this the Libertarians were unable to do.

The upshot is that regardless of how this Court might ultimately dispose of the petition in this cause, the Libertarians will still only regain official recognition of their status as a political party by mounting a new ballot access petition drive. No decree of this Court could provide specific relief of a conclusive nature. In effect, the Libertarians seek an advisory opinion.

The Respondents anticipate that the Libertarians might respond to these points by asserting that even if they remain decertified, reinstatement of the prior statutes on these subjects would at least permit them to regain their certified status by submission of only five thousand (5,000) signatures on a ballot access petition, as provided under 26 O.S.1971, § 229. Yet, it hardly seems likely that this Court could seriously consider forcing Oklahoma to return to such a minimal standard for initial ballot access. After all, the requirement of petitions showing 5 percent of voters at the last preceding election for initial political party ballot access was expressly approved by this Court in the case of Jenness v. Fortson, 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971), as well as a requirement that status retention depended upon attainment of 20 percent of the vote at the election.

The Respondents are hardly willing to concede the existence of any constitutional infirmity in Oklahoma's presently extant system of ballot access regulation. But, even under previously existing law, which would be reinstated should this Court grant the relief sought by the Libertarians, that organization's status would remain unchanged. It would still be an affiliation of electors representing a political organization, without the right to recognition as a political party, absent a new petition drive to attain such status. It follows that

the primary questions tendered for review by the Libertarians fail to offer a case or controversy within the meaning of Article III of the Constitution, and it is entirely inappropriate for this Court to undertake the review requested.

II. The decision in the case of McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980) is in complete harmony with the decision of the Tenth Circuit Court of Appeals in the instant case.

In McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980), the Court of Appeals for the Eighth Circuit was called upon to review a decision of a United States District Court which had overruled a challenge by a new North Dakota political party to the ballot access provisions of the election laws of that state. The district court in McLain had reviewed North Dakota's ballot access regulations under the rational basis standard and had concluded that the access requirements were rationally related to the state's legitimate objective of avoiding confusion, deception and frustration of the democratic process. Id. 637 F.2d at 1163.

The Eighth Circuit reversed, finding that the decisions of the United States Supreme Court in the ballot access field require the heightened scrutiny which is necessary where fundamental rights are implicated, and further finding that the access statutes

there reviewed could not withstand such heightened scrutiny.

The Respondents are completely unable to discern any meaningful distinction between the treatment afforded the North Dakota ballot access statute in McLain, and that afforded Oklahoma's ballot access statute by the Tenth Circuit Court of Appeals in the opinion below. It is plain from the decision in this case below that the Tenth Circuit, like the Eighth, closely scrutinized the ballot access statute presented. The opinion below expressly observed that:

> "The issue here presented is whether these Oklahoma ballot access restrictions unduly burden the plaintiffs' first and fourteenth amendment rights to political association and ballot access. After careful examination of the challenged statutes, we have determined that these Oklahoma election laws can withstand close scrutiny, that they advance compelling state interests, and that they accomplish important state goals without unduly burdening the constitutional rights of political parties and their members. We are thus in accord with the trial court's judgment." Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375, 1379 (10th Cir. 1982).

If there exists any difference at all between these two circuit courts of appeals decisions, it is only in the fact that the Eighth Circuit disapproved North Dakota's ballot access system, whereas the Tenth Circuit has upheld Oklahoma's. Yet this circumstance hardly reflects any dispute among the circuit courts regarding ballot access law. Rather, the difference in the results reached merely reflects that the North Dakota system was significantly more restrictive than that provided by Oklahoma law.

In the most recent comprehensive review of ballot access law provided in a decision of this Court, Justice Rhenquist observed that:

> "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.' Bullock v. Carter, 405 U.S. 134, 143, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972). 'In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact upon voters.' Ibid. In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a 'litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection

> Clause.' Storer v. Brown, 415 U.S. 724, 730, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. Ibid., Williams v. Rhodes, 393 U.S. 23, 30, 21 L.Ed.2d 24, 89 S.Ct. 5, 45 Ohio Ops2d 236 (1968)." Clements v. Fashing, ___ U.S. ___, 73 L.Ed.2d 508, 516, 102 S.Ct. ___ (1982). (Emphasis added)

In light of the relatively fluid standard of heightened scrutiny endorsed by this Court and the balancing of multiple factors which is necessary in order to resolve any challenge to a state ballot access restriction, it becomes apparent that different federal courts will inevitably reach different results when examining the access restrictions imposed by different states.

This is well illustrated by the two circuit courts of appeals decisions presented here. In McLain, there were two aspects of the North Dakota ballot access system which were found by the Eighth Circuit Court of Appeals to be most significant. These were the number of signatures required to be presented in support of the

petition for initial ballot access by new political parties, and the date prior to the election by which such petition had to be filed with state authorities. Id. 637 F.2d at 1164. Under the North Dakota statute there attacked, it was necessary for a new party seeking official recognition to submit fifteen thousand (15,000) signatures by no later than June 1 of the election year. Id. 637 F.2d at 1162.

The new political party in McLain was seeking access to the North Dakota ballot for the 1978 elections. Therefore, the fifteen thousand (15,000) petition signatures required for ballot access in that year represented a bit more than 5 percent of the 297,188 votes cast for presidential electors at the last preceding election, held in 1976. See, 12 AMERICA VOTES 286 (Scannon & McGilliway ed. 1977). Even though the petition signature requirement for 1978 considered by the Court in McLain was slightly more burdensome upon the aspiring new party (when reduced to a percentage figure) than that which operates in Oklahoma, the Eighth Circuit opinion admitted that it was arguably valid under the decisions of the United States Supreme Court, at least if viewed standing alone.

It was, therefore, only when the petition signature requirement in North Dakota was viewed in conjunction with the relatively early filing deadline that the scales

of the balance tipped against the North Dakota ballot access regulation. North Dakota's deadline for the petitions was June 1, more than 90 days before the primary election and more than 150 days before the general election. McLain v. Meier, supra, 637 F.2d at 1164.

In Oklahoma, however, the filing deadline for ballot access petitions is significantly later, on July 1. 26 O.S.Supp.1974, § 1-108. This is less than 60 days before the first primary elections and not more than about 130 days before any general election. The additional time permitted to new political parties to garner the signatures necessary for qualification for recognized party status under Oklahoma law provides a distinction between North Dakota law and Oklahoma law which is far more than merely theoretical. It provides a fairly clear explanation of why the balancing process conducted by each circuit court of appeals produced different outcomes in the two cases.

What remains most clear is that the Eighth and Tenth Circuit Courts of Appeals each applied the same legal standards to the ballot access regulations placed before them. Each court conducted the necessary balancing and each reached conclusions which are sustainable under the differing circumstances. It follows that there exists no split of authority among the circuit

courts which would justify an exercise of jurisdiction by this Court.

III. Ballot access cases, by their very nature, will tend to turn upon a balancing of unique facts and circumstances presented by the particular combination of restrictions embodied in the relevant state statutes. This makes such cases peculiarily inappropriate for review on Petition for Writ of Certiorari, especially where the district court and the circuit court of appeals have conducted the requisite balancing and have reached the same result.

It has been the consistent and sound policy of this Court to decline to grant petitions for writs of certiorari in cases which tend to be resolvable more upon their own peculiar facts than upon an application of principles of law. See, e.g., Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509, 68 L.Ed. 413 (1924); United States v. Johnston, 268 U.S. 220, 227, 69 L.Ed. 925 (1925).

Yet it may be that there is no field of constitutional doctrine where cases are more likely to turn upon their own peculiar facts and circumstances than the field of ballot access law. This was expressly recog-

nized by Justice White's opinion in the case of Storer v. Brown, 415 U.S. 724, 730, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974), where the Court observed that:

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a matter of degree, (citation omitted) very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. (citation omitted) What the result of this process will be in any specific case may be very difficult to predict with great assurance." (Emphasis added)

This much is plain about the experience of the Libertarian Party in Oklahoma, notwithstanding the contrary assertions of the Petitioner: The requisite

balancing of the relevant facts and circumstances, with proper application of the appropriate level of enhanced scrutiny mandated by the decisions of this Court, has been undertaken and performed by both the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit. As this Court observed in the case of Graves Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 93 L.Ed. 672 (1949):

> "A Court of law such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The Libertarian organization in Oklahoma has not been denied official political party status because Oklahoma ballot access restrictions are unduly burdensome. Rather, they have been denied such status because of the nearly total absence of popular support for their organization among Oklahoma voters. All of the factors relevant to this situation have been fully analyzed and balanced by both of the lower courts which have considered the matter. Accordingly, there is no proper basis for further consideration of such matters by this Court.

CONCLUSION

One of the Libertarians' most basic assertions in this case is that Oklahoma, having once possessed a system of regulating ballot access which is argued to have adequately served the State's legitimate interests, is constitutionally prohibited from altering its ballot access laws in any way which would arguably be more restrictive. Yet, this is precisely the kind of "litmus-paper" test which this Court has consistently rejected in ballot access cases, and which was properly rejected by the lower courts in this case.

It further appears that this cause presents a situation where, as a practial matter, no decree by this Court could effectively grant dispositive and conclusive relief among the litigants. Regardless of the outcome here, the Libertarians will not regain official recognition of their organization as a political party. This raises a serious question of whether there exists a case or controversy within the jurisdictional bounds of Article III of the Constitution.

It is also plain that no conflict exists among the various circuit courts of appeals which would justify granting review via the Petition for Writ of Certiorari. Just as importantly, this case, like most ballot access cases, turns so peculiarly upon its own facts that review via Petition for Writ of Certiorari is singularly inappropriate.

For all of these reasons, the Respondents pray that this Honorable Court will deny the Petition for Writ of Certiorari by the members of the Libertarian Political organization of Oklahoma.

Respectfully submitted,

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No. 82-1160

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANATOLY ARUTUNOFF, et al.,

Petitioners,

v.

THE OKLAHOMA STATE ELECTION BOARD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE
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TOM LAURENT, PAUL WOODARD, JIM SESSIONS,
THOMAS G. WINTER, DAN PHILLIPS,
LYNN CRUSSEL, AND GORDON MOBLEY,

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v.

THE OKLAHOMA STATE ELECTION BOARD,
GRACE HUDLIN, CHAIRMAN OF THE
OKLAHOMA STATE ELECTION BOARD;
DREW NEVILLE, VICE CHAIRMAN OF
THE OKLAHOMA STATE ELECTION BOARD;
AND LEE SLATER, SECRETARY OF THE
OKLAHOMA STATE ELECTION BOARD,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

I. The Predominate Question Offered For Review By The Petitioners Presents A Case Or Controversy

Within This Court's Jurisdiction Under The United States Constitution, Art.III, §2, cl.1, Because Oklahoma Statutes, Title 26, § 111 (Repealed January 1, 1975) Did Not Require That A Political Party In Oklahoma--Since The 1914 General Election--Receive At Least 5 Percent Of The Vote At The Last Preceding Election

The Respondents make the claim on page 9 of their brief in opposition that Okla. Stat. Tit. 26, §111 (1971), repealed by 1974 Okla. Sess. Laws ch.153, §17-114, required a political party to ". . . receive at least 5 percent of the vote at the last preceding election, . . . " in addition to ". . . 10 percent of the vote [of the winning Presidential or Gubernatorial candidate] at either of the two last preceding elections." Therefore, the Respondents

conclude, there is no justiciable case or controversy within this Court's jurisdiction under the United States Constitution, Art. III, §2, cl.1, because the Libertarians failed to obtain 5 percent of the vote for President in Oklahoma in the 1980 General Election, and, thus, failed to meet the requirement of §111. The trouble with the above argument of Respondents is that it is based on a blatant misinterpretation of Okla. Stat. Tit. 26, §111 (Repealed 1975).

When read in its entirety, the aforesaid §111, except as to the General Election of 1914, never required 5 percent of the vote, but only 10 percent of the winning candidate's vote for Governor or President in only one of the past two General Elections. Such a conclusion can be borne out by considering the fate of the American Party in Oklahoma after the 1972

election. The American Party in Oklahoma received less than 5 percent of the vote for Governor in 1970, and yet was not removed from the Oklahoma ballot until after the 1972 election in which their candidate for President in Oklahoma received less than 5 percent of the vote. Oklahoma Election Board, Directory of Oklahoma for 1981 at 653 and 759. Under Respondents' reasoning the American Party should have lost its place on the ballot after the 1970 election, rather than after the 1972 election when the party failed for the second time in a row to get 10 percent of the winning candidate's vote.

Perhaps the definitive interpretation of the old §111 was provided by the Supreme Court of Oklahoma in the case of Craig v. Bond, 160 Okla. 34, 15 P.2d 1014 (Okla. 1932). In the Craig case the Court remark-

ed upon the fact that in 1930 the Socialist Party in Oklahoma was only removed from the ballot for the first time when it failed to meet the requirement of 10 percent of the winning candidate's vote in one of two successive elections. Craig v. Bond, supra, at 1016. It should be further noted that the above result occurred only after the failure to meet the aforesaid two successive elections requirement, even though the Socialist Party in a number of previous elections failed to get 5 percent of the vote by obtaining one percent of the vote or less. Oklahoma Election Board, Directory of Oklahoma for 1981 at 653, 696, and 704. (Also see the dissenting opinion of Justice Riley in the case of Cooper v. Cartwright, 200 Okla. 456, 195 P.2d 290, 298 (1948).

Therefore, under a proper interpre-

tation of Okla. Stat. Tit. 26, §111 (Repealed 1975), if §111 had been in effect in 1980, the Libertarian Party in Oklahoma would have had one more General Election in which to attempt to obtain 10 percent of the winning candidate's vote--in which case favorable relief from the Court would not be an advisory opinion, but would place the Libertarians back on the Oklahoma ballot as a recognized political party. Paradoxically, this is even the (forgotten) view of the Oklahoma Attorney General's Office:

> A political party in the State of Oklahoma to remain a political party, must receive ten percent of the votes cast for the party receiving the highest number of votes in two general elections following each other involving the election of the President of the United States and the Governor of the State of Oklahoma. Specifically, the American Party must receive ten percent of the votes cast in the 1970 General Election for the Democratic nominee for the Office of Governor. . . or to have received ten percent of the votes cast for the Republican nominee for President of the United States in the 1972 election. Op.Atty.Gen. No. 72-289 (August 20, 1973).

II. The Decision In McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980), And Decisions Of This Court, Are Contrary To The Decision In Question Of The Tenth Circuit Court Of Appeals As To The Use Of Historical Election Experiences And Data

Respondents fail totally in proposition II of their brief in opposition to comment on the Tenth Circuit's failure to discuss at all the historical election experiences and data as to the issues of the case at bar. The Court below simply held that the laws in question were not "unconstitutional, per se." Arutunoff v. Oklahoma State Election Board, 687 F.2d 1375 at 1379 (10th Cir. 1982). Such a ruling is not in accord with either McLain v. Meier, supra, at 1165 nor decisions of this Court, e.g., Storer v. Brown, 415 U.S. 724, at 742 (1974), which did not use a

"per se" test, but rather looked at the experiences of other political party and independent candidates. Further, contrary to Respondents' brief in opposition (page 16), Oklahoma's petition deadline for new parties is not July 1, but rather 90 days after the notice of intent to form a recognized political party--which means not later than 90 days after February 28 or 29. Okla. Stat. Tit. 26, §1-108 (Supp. 1974).

CONCLUSION

Wherefore, having replied to Respondents' brief in opposition, Petitioners request that this Court grant a writ of certiorari to the Tenth Circuit Court below.

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